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No. 91-1867

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHN M. SPEAR and SPEAR PRINTING CO., INC.,
Petitioners,

v.

TOWN OF WEST HARTFORD,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does a town's deliberate filing of a frivolous RICO suit against a newspaper editor and publisher, predicated solely upon the allegedly "extortionate" publication of an editorial criticizing the town, violate the first amendment?

2. Is malicious government prosecution of a frivolous civil lawsuit in retaliation for the exercise of first amendment rights actionable under 42 U.S.C. § 1983?

3. Does a town's deliberate filing of a frivolous RICO suit against a newspaper editor and publisher, predicated solely upon the allegedly "extortionate" publication of an editorial criticizing the town, "shock the conscience" for purposes of a due process claim under the fourteenth amendment?

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REPLY TO BRIEF IN OPPOSITION

The petition for certiorari in this case raises the question whether a federal remedy exists when a municipality, in response to the publication of an editorial sharply criticizing that municipality, subjects a newspaper editor and publisher [1] to a frivolous civil RICO suit based solely upon that editorial.

The respondent Town of West Hartford has not contested the facts of this case. At issue, then, are the three legal questions posed in the petition for certiorari. Pet. at i.

These questions address petitioners' three separate theories of federal relief: 1) for violation of the first amendment; 2) for malicious civil litigation by govern-

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[1] Petitioner Spear Printing Company, Inc., is a corporation with no parent companies or subsidiaries. *See* Sup. Ct. R. 29.1.

ment; and, 3) for violation of due process. The petition for certiorari, addressing these questions in turn, demonstrates the dramatic departure of the Second Circuit's decision from the precedents of this Court as well as from the decisions of other federal courts of appeals. As shown in the present reply brief, respondent has given no sound reason for denying review.

I. THE SECOND CIRCUIT CREATED A NEW AND ADDITIONAL ELEMENT FOR ASSERTED *PAST* VIOLATIONS OF FIRST AMENDMENT RIGHTS BY REQUIRING A PLAINTIFF TO ALLEGE *SUBSEQUENT* INJURY TO FREE SPEECH.

Petitioner John Spear, editor of the *Orange County Post* (a weekly newspaper), published an editorial accusing the respondent Town of West Hartford (hereinafter "the town") of police brutality. The town responded by suing Spear and the *Post's* publisher, respondent Spear Printing Co. (hereinafter collectively "Spear"), under the federal RICO statute, alleging that the publication of the editorial constituted federal criminal extortion (a predicate offense under RICO).

This absurd RICO extortion claim was entirely frivolous, was filed solely in response to a classic exercise of rights of free speech and free press, and caused Spear concrete damages in the form both of legal defense fees incurred and fear, mental anguish, and worry suffered. *See* Pet. at 4.

Spear therefore has a valid cause of action, under 42 U.S.C. § 1983, for a violation of first amendment rights and the infliction thereby of both compensable and nominal damage. *Carey v. Piphus*, 435 U.S. 247, 255, 264 (1978). *See* Pet. at 8-9.

The Second Circuit disallowed Spear's federal civil rights claim by disregarding Spear's allegations of concrete injury and imposing instead a requirement that Spear, unlike every other federal civil rights claimant

seeking damages, must allege the *subsequent* loss of first amendment rights. Pet. § I.

The town's assertion that Spear alleged no more than that he suffered a subjective "chilling effect" on speech, Brief in Opp. at 7-8, is patently false, *see* Complaint ¶¶ 22, 56, 58, 71 (App. 33a, 40a, 41a, 43a) (allegations of concrete monetary and mental injury). The town's attempt to shoe-horn this case into the factual scenario of *Laird v. Tatum*, 408 U.S. 1 (1972), is likewise erroneous.

Laird and the lower court cases the town cites all dealt with plaintiffs who challenged governmental surveillance or information-gathering, where the plaintiffs suffered *no concrete injury whatsoever.*

The rule of *Laird* and cases following it is that a plaintiff lacks standing when the only injury plaintiff alleges is the fear that a governmental body "might in the future take some *other* and additional action detrimental to the individual." *Id.* at 11 (emphasis in original). *Laird* did *not* disturb, and in fact explicitly acknowledged, the "established principle" that a plaintiff who "has sustained . . . a direct injury as the result of [the challenged] action" has standing. *Id.* at 13 (citation and internal quotation marks omitted).

In the present case, Spear has suffered—and alleged—a "direct injury," namely, monetary damages and mental distress. Pet. at 4, 8-9. *Laird* is therefore inapposite.

The Second Circuit required Spear to plead not only that he suffered financial and mental injury for the exercise of his right to free speech and free press but also that he "declined to write" or "toned down his writing" in *subsequent* editorials. This novel requirement of "future injury to speech" is completely unprecedented. *See* Pet. at 9. This Court should grant review to consider the Second Circuit's major departure from the prior decisions of this Court.

II. THE SECOND CIRCUIT'S HOLDING, THAT VEXATIOUS CIVIL LITIGATION BY GOVERNMENTAL BODIES IS CATEGORICALLY OUTSIDE THE SCOPE OF § 1983, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS.

The Second Circuit categorically excluded, from the scope of 42 U.S.C. § 1983, actions to redress malicious civil litigation by government, even when that malicious litigation penalizes the exercise of a constitutional right. 954 F.2d at 68 (App. 10a). As demonstrated in the petition for certiorari, this novel *per se* rule conflicts with the rule in other federal circuits, specifically the Fifth [2] and Seventh Circuits. *See* Pet. § II (citing authorities).

The Second Circuit cited only one case in support of its blanket rule. 954 F.2d at 68 (App. 10a). This case does not support the Second Circuit's novel rule, Pet. at 11 n.10, and the town does not pretend to argue that it does.

Instead, the town cites other cases which hold that malicious government litigation—*whether civil or criminal*—does not give rise *without more* to a cause of action under § 1983. *E.g., Coogan v. City of Wixom*, 820 F.2d 170, 174-75 (6th Cir. 1987) (malicious criminal prosecution); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187, 1189 (5th Cir. 1978) (per curiam) (malicious civil litigation). These cases *do not* embrace any categorical distinction between malicious civil and criminal litigation

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[2] The Fifth Circuit explicitly affirmed, in *Howard Gault Co. v. Texas Rural Legal Aid, Inc.*, 848 F.2d 544 (5th Cir. 1988), an award of damages for the improper use of civil litigation to suppress first amendment rights, *id.* at 557 (unconstitutional TRO against picketing). *See* Pet. at 10-11 & n.8. The town attempts to distinguish this specific holding by quoting unrelated language from the district court decision in *Howard Gault*, 615 F. Supp. 916, 938 (N.D. Tex. 1985). *See* Brief in Opp. at 10-11. But in the quoted portion of the district court's opinion in *Howard Gault*, that court merely restated the rule, discussed *infra*, that malicious litigation *without more* is not actionable under § 1983. 615 F. Supp. at 938.

and therefore *do not* support the Second Circuit's *per se* rule. On the contrary, these cases explicitly anticipate that frivolous government litigation which *infringes a constitutional right* is actionable under § 1983. *E.g.*, *Beker*, 581 F.2d at 1189 (malicious civil litigation) ("misuse of legal procedure may be so egregious as to constitute a violation of Section 1983 . . . if the tort-feasor, under color of state law, subjects the tort-victim to a deprivation of Constitutional dimension") (citing cases).[3] *Accord Coogan*, 820 F.2d at 175 (malicious criminal prosecution). Indeed, this Court's recent decision in *Wyatt v. Cole*, 60 U.S.L.W. 4383 (U.S. May 18, 1992), assumes the actionability of both malicious (criminal) prosecution and abuse of (civil) process under § 1983, *see id.* at 4385 & n.2.

The town's primary authority for the Second Circuit's *per se* rule is a single dictum quoted out of context from *McMaster v. Cabinet for Human Resources*, 824 F.2d 518, 522 (6th Cir. 1987). But in *McMaster* the parties agreed, and the court of appeals did not dispute, that "malicious prosecution may, in an appropriate case, support a section 1983 action," even where the alleged malicious litigaiton was *not* a criminal prosecution. *Id.* at 520 (malicious administrative proceedings). The *McMaster* court accurately observed, in the dictum the town quotes, that as a matter of *fact* § 1983 suits almost always involve malicious *criminal* prosecution, *id.* at 522. But this is by no means tantamount to a *legal holding* that malicious *civil* litigation is never actionable. The *McMaster* court specifically cites in support of its dictum a treatise, S. Nahmod, *Civil Rights and Civil Liberties Litigation* § 3.10, at 155 nn.181-82 (2d ed. 1985), which treatise provides:

> Currently, there is some dispute in the circuits about the *nature and scope* of these § 1983 malicious prose-

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[3] The town ignores this explicit language in attempting to explain away *Beker*. Brief in Opp. at 10.

> cution and *abuse of process* actions.[181] Nevertheless, the majority of the circuits *acknowledge the possibility of such § 1983 actions.*[182]

Id. (emphasis added). This treatise, in short, is authority *in support of Spear* and *in conflict with the Second Circuit's rigid per se rule.* The *McMaster* dictum, relying upon this treatise, is certainly no authority for the Second Circuit's blanket rule against malicious civil litigation claims under § 1983.

The Second Circuit's *per se* rejection of § 1983 relief against malicious governmental civil litigation, even where (as here) the frivolous governmental litigation directly penalizes the exercise of constitutional rights, represents a dramatic departure from the decisions of other federal circuits. This Court should grant review and resolve this conflict in the circuits before the Second Circuit's erroneous ruling spawns further precedential disarray.

III. THE SECOND CIRCUIT ADOPTED AN EXTREME CONSTRUCTION OF THE "SHOCK THE CONSCIENCE" ELEMENT OF A DUE PROCESS CLAIM.

The Second Circuit held that it does not "shock the conscience" for a town to file a frivolous RICO suit accusing a newspaper editor and publisher of federal criminal exortion solely on the basis of an editorial criticizing the town. The Second Circuit on this basis disallowed Spear's federal civil rights claim under the liberty clause of the fourteenth amendment. 954 F.2d at 68 (App. 9a).

The town essentially does no more than assert its agreement with the Second Circuit's ruling. Brief in Opp. at 11-12. But the patent outrageousness of the town's malicious punishment of the mere printing of a newspaper editorial speaks for itself.

This Court should grant the present petition to review the Second Circuit's miserly construction of the liberty guarantee of the fourteenth amendment.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition for Writ of Certiorari, this Court should grant review in the present case.

Respectfully submitted,

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